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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

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JOHN M. WEIBLE,

Petitioner,

v.

DOCTOR'S ASSOCIATES, INC. and
FRANCHISE WORLD HEADQUARTERS, INC.,

Respondents.

---

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

---

# PETITION FOR A WRIT OF CERTIORARI

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November 12, 1996

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether a court of appeals may grant judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a) under a manifest injustice standard?

(2) Whether a court of appeals may grant a judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) after determining that the pre-verdict motion under Fed. R. Civ. P. 50(a) raised no discernible grounds for judgment as a matter of law, under a manifest injustice standard?

(3) Whether a court of appeals may grant judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in the pre-verdict motion under

Fed. R. Civ. P. 50(a) without affording the opposing party an opportunity to present evidence which it contends would have cured the alleged deficiency?

## PARTIES TO PROCEEDINGS

The parties are Doctor's Associates, Inc. and Franchise World Headquarters, Inc., Plaintiffs and John M. Weible, Defendant. There are many companies affiliated with the Plaintiffs with respect to the Subway Sandwich franchise store chain such as Subway Sandwich Shops, Inc., Subway Restaurants, Inc., Subway Real Estate Corp., Franchise Real Estate Leasing Corporation, and numerous leasing companies with "Subway" in their name, none of which are publicly traded. All such companies are either owned by Frederick DeLuca and Peter Buck, equally, or are subsidiaries of companies owned by them.

Petitioner is not aware of any other subsidiary, parent company, affiliate or shareholder which is

required to be listed pursuant to Rule 29.01.

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---

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

---

# PETITION FOR A WRIT OF CERTIORARI

---

John M. Weible respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit entered on August 12, 1996.

## OPINIONS BELOW

The August 12, 1996 judgment of the Second Circuit is reported as *Doctor's Associates, Inc. and Franchise World Headquarters, Inc. v. John M. Weible*, 92 F.3d. 108 (2nd Cir. 1996) and is reprinted in the appendix.

## JURISDICTION

This Court has jurisdiction to review the judgment of the Second Circuit under 28 U.S.C. §1254(1).

The Second Circuit had jurisdiction to review the judgment of the District Court under 28 U.S.C. §1291.

## STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 50 (a) and (b), which are set forth in the appendix.

## STATEMENT OF THE CASE

Doctor's Associates, Inc. ("DAI") is the national franchiser for Subway Sandwich Shops. It contracts with Franchise World Headquarters, Inc.("FWHI") to provide franchiser services to its franchisees and to otherwise perform the functions of the franchiser. Both companies are owned by Frederick DeLuca and Peter Buck on a 50-50 basis.

John M. Weible ("Weible")became a Subway franchisee in Los Angeles County, California during June, 1988. He took over an existing Subway store and immediately increase sales dramatically, receiving numerous awards. A dispute arose between Weible and DAI about Weible's right to purchase a second franchise for a reduced franchise fee.

Eventually Weible stopped paying royalties under the franchise agreement which permitted him to withhold payment in case of default by DAI.

DAI then employed its alter ego leasing company, Subway Sandwich Shops, Inc. to evict Weible from his Subway shop during October, 1990.

Weible then filed suit against DAI and others in Los Angeles County, California, but was compelled to arbitrate his claims against DAI in Connecticut by an order of the Superior Court of Los Angeles County.

Weible then filed an arbitration demand with the American Arbitration Association in Hartford, Connecticut. His lawsuit in Los Angeles County, California was stayed pursuant to the same order.

While the arbitration demand was pending and the Los Angeles County lawsuit was also pending (but stayed pending arbitration) DAI accused Weible of violating the federal wiretap statutes by allegedly listening to its voice mail messages. Leonard Axelrod, Vice President and Chief in-house Counsel for DAI and FWHI, advised Weible that he would be prosecuted criminally and civilly for violation of the federal wiretap statutes unless he dropped his arbitration demand and dismissed his Los Angeles County lawsuit. Weible refused.

Shortly thereafter, DAI attempted to assert a claim against Weible for alleged violations of the federal wiretap statute in the pending arbitration. Eventually the arbitrators determined that such claim was not within the scope of the arbitration

clause. Thereafter DAI and FWHI filed a complaint against Weible in the District court of Connecticut alleging violation of the federal wiretap statute and the Connecticut Trade Secrets Act.

Weible filed a counter-claim against DAI and FWHI for abuse of process claiming the wiretap complaint had been filed against him primarily for the ulterior purpose of coercing him to dismiss his arbitration claim and lawsuit instead of for the purpose of resolving a claim under the wiretap statute and the Connecticut Trade Secrets Act.

DAI and FWHI moved to dismiss the counter-claim alleging it was really an action for malicious prosecution not abuse of process, and that motion was denied by the District Court.

While the wiretap case was pending in the District Court of Connecticut, the arbitrators decided all issues in favor of Weible and awarded him $219,900.00.

Thereafter the wiretap case came to trial during June, 1995. DAI and FWHI claimed no damages for Weible's alleged violations of the wiretap statute and the Trade Secrets Act. They had marked as an exhibit their claim for attorney's fees in excess of $180,000.00 which they were prepared to submit against Weible in the event they were successful on their wiretap claims. In the arbitration DAI had claimed in excess of $330,000.00 in attorney's fees for attempting to assert a claim for $25,000.00 for alleged unpaid royalties. Those issues were decided against DAI in the arbitration.

Gerald Hadelman, a Subway franchisee closely affiliated with DAI and FWHI, had previously admitted violating the wiretap statute and listening to voice mail messages of DAI and FWHI and, when caught, had alleged that Weible had done the same.

DAI and FWHI chose to bring no charges or claims against Gerald Hadelman, who did not have a claim pending against them.

Weible denied violating the wiretap statute and Trade Secrets Act. DAI and FWHI called Hadelman as their witness. After testifying on direct examination that Weible had told him that he had listened to voice mail messages of DAI and FWHI, improperly, on cross examination he invoked the Fifth Amendment against self incrimination repeatedly.

Weible incurred attorney's fees and litigation expenses in the sum of $56,555.83 before the trial began.

The jury returned a verdict for Weible on the claims against him and in favor of Weible and against DAI and FWHI on his counter-claim, awarding Weible $95,000.00 in actual damages and $115,000.00 in punitive damages for abuse of process.

DAI and FWHI presented an oral pre-verdict motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which, according to the Second Circuit failed to raise "an oasis of an idea in this sandstorm of words." a-13.

The jury was instructed, without objection, that it could return a verdict in favor of Weible on his counter-claim if it found that DAI and FWHI began the lawsuit against Weible to

coerce him into settling the actions against them rather than primarily to bring him into account for what they believed to be his unauthorized use of their voice-mail system. a-17.

DAI and FWHI then filed a post-verdict motion under Fed. R. Civ. P. 50(b) contending that the tort of abuse of process, under Connecticut law, required something more that a ulterior motive, and also required some specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation. a-15,16.

The Connecticut District Court denied the post-verdict motion, finding there was evidence to support the counter-claim for abuse of process, as charged in the instructions. a-17. The District Court reduced the actual damage

award from $95,000.00 to $56,555.83. Both sides appealed.

On appeal, in response to the argument that some other specific wrongful conduct during the pendency of the case was required, Weible included, in the appendix, the statement for attorney's fees of DAI and FWHI marked as an exhibit for trial but not offered into evidence, to show that DAI and FWHI regularly communicated with the FBI and the United States Attorney's office for Connecticut, attempting to convince them to bring criminal charges against Weible. a-29-a-32. In his appellate brief, Weible also included two letters from the U.S. Attorney's office, dated April 14, 1994 and February 14, 1995, addressed to Weible's attorney, advising Weible that criminal charges would be filed against him. a-27,28. The first

letter was dated shortly before an initial trial setting for the case and the second letter a few months before the trial. a-27,28,30,32.

Weible argued that if he had been given an opportunity to meet the claim presented in the post-verdict motion for the first time, he would have offered this evidence to show that DAI and FWHI had abused process by using information in the civil case to convince the U.S. Attorney's Office to inaccurately advise Weible that criminal charges would be brought against him for the purpose of coercing him to settle on DAI's terms. The litigation Between Weible and DAI and others in California is still pending, on appeal.

The Second Circuit granted the motion of DAI and FWHI to strike this material from the appellate record.

The appellate opinion mentions only that DAI and FWHI provided information to the FBI and U.S. Attorney's Office, and disregards the proposed evidence that the U.S. Attorney actually sent two letters to Weible inaccurately advising him that criminal charges would be filed. a-27,28. No criminal charges were ever filed.

The Second Circuit held that manifest injustice would result unless the Court disregarded the requirement that judgment as a matter of law may not be granted pursuant to a motion under Fed. R. Civ. P. 50(b) unless the grounds therefor were raised in a pre-verdict motion under Fed. R. Civ. P. 50(a). a-14.

**REASONS FOR GRANTING THE WRIT**

(1) The Court should grant the Petition to resolve the conflict between

the 3rd, 6th, 7th, 8th, 9th, 10th, 11th, D.C. and Fed. Circuits, which do not permit judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a) and the 1st, 2nd, 4th, and 5th, Circuits which permit such judgments under manifest injustice or similar equitable standards.

The Second Circuit apparently interpreted Connecticut law to require that the coercive threat to prosecute Weible civilly and criminally for alleged wiretap violations be made after and not before the wiretap complaint was filed, to establish the required wrongful conduct. a-16,19,20. While it would seem that the requirement that the coercive threat be made after, instead of immediately before, the lawsuit was

filed is somewhat hyper-technical, this argument was not advanced by DAI and FWHI until after the verdict was rendered.

Fed. R. Civ. P. 50 was amended in 1991 to require that the pre-verdict motion articulate the basis on which a judgment as a matter of law might be rendered so that the responding party could seek to correct any overlooked deficiencies in the proof. The revision was intended to alter the result in cases in which the courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. Fed. R. Civ. P. 50(a), advisory committee notes, 1991 amendment with respect to paragraph (a)(2).

The amended rule retained the concept that the post-verdict motion is a renewal of the pre-verdict motion to avoid any question arising under the Seventh Amendment to the United States Constitution. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940).

"A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. E.g., *Cutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3rd Cir. 1989)." Fed. R. Civ. P. 50(b), advisory committee notes, 1991 amendment, subdivision (b).

Nine circuits currently enforce the rule that judgments as a matter of law may not be granted pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a), and that a pre-verdict motion

which fails to raise "an oasis of an idea in this sandstorm of words" (a-13) fails to preserve any ground for a post-verdict motion under Fed. R. Civ. P. 50(b). The 3rd, 6th, 7th, 8th, 9th, 10th, 11th, D.C., and Federal Circuits enforce the rule as written and do not permit deviations on equitable grounds such as the manifest injustice standard. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172, 1173 (19,20)(3rd Cir. 1993), *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 544 (8,9)(6th Cir. 1995), *U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286, 1287 (12)(7th Cir. 1995), *Jones Truck Lines, Inc. v. Full Service Leasing Corp.* 83 F.3d 253, 258 (6)(8th Cir. 1996), *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (2-4)(9th Cir.

1990), *First Security Bank of Beaver, Okla. V. Taylor*, 964 Fed.2d 1053, 1057 {3,4}(10th Cir. 1992), *Caban-Wheeler v. Elsea*, 71 F.3d 835, 842 {8-10}(11th Cir. 1996), *Whelan v. Abell*, 48 F.3d 1247, 1252, 1253 {4-6}(D.C. Cir. 1995), *Hoechst Celanese Corp. v. BP Chemicals, Ltd.*, 78 F.3d 1575, 1581, 1582 {11, 12}(Fed. Cir. 1996).

*Whelan v. Abell* held that the right to challenge new grounds for judgment as a matter of law asserted for the first time in a post-verdict motion could be waived by failing to contest the post-verdict motion on those grounds. Weible immediately responded to the post-verdict motion of DAI and FWHI by contending that it attempted to raise grounds not raised in the pre-verdict motion, and did not waive the right to

contest the post-verdict motion on those grounds.

On the other hand the 2nd Circuit, (a-1-22), and the 1st, 4th, and 5th Circuits have permitted post-verdict motions to raise new grounds for judgment as a matter of law under manifest injustice and similar equitable standards. *Simon v. Navon*, 71 F.3d 9, 13, 14 (1-5)(1st Cir. 1995), *Singer v. Dungan*, 45 F.3d 823, 828 (7,8)(4th Cir. 1995), *Polanco v. City of Austin, Texas*, 78 F.3d 968, 974, 975 (5-8)(5th Cir. 1996), a-1-22.

This court should grant the petition to resolve this conflict.

(2) In the alternative, the court should grant the Petition to establish the standards for determining manifest injustice or other equitable grounds for

avoiding the requirements of Fed. R. Civ. P. 50(a) and 50(b).

DAI and FWHI brought the wiretap and trade secrets claims against Weible with knowledge that they had suffered no actual damages, with the intent to assess their attorney's fees against him in a sum in excess of $180,000.00 if they prevailed, while failing to bring similar claims against Gerald Hadelman who had admitted improperly listening to their voice mail messages, after threatening Weible with civil and criminal prosecution for the alleged wiretap violations if he did not dismiss his pending arbitration demand and lawsuit in California. DAI and FWHI also knew Weible was without funds. The cost of arbitrating the claim on which he had been awarded $219,900.00 offset the amount of the award. DAI had

claimed $330,000.00 in attorney's fees in the arbitration allegedly incurred in attempting, unsuccessfully, to establish a $25,000.00 counter-claim against Weible. The Second Circuit, nevertheless, found that manifest injustice would result if DAI and FWHI were not permitted to raise, for the first time, grounds for judgment as a matter of law after the verdict was rendered. The manifest injustice standard employed by the Second Circuit provides that if a timely motion for judgment as a matter of law should have been granted, manifest injustice requires the court to grant an untimely motion. a-14. Apparently the Second Circuit disregarded the above listed facts which Weible contends should be considered in applying an equitable, manifest injustice standard.

Currently the "manifest injustice" standard grants a roving commission to the appellate courts. Manifest injustice, under this non-standard, obviously will vary from appellate panel to appellate panel and from circuit to circuit.

In the alternative, the court should grant the petition to establish uniform rules for determining the manifest injustice standard.

(3) In the alternative, the court should grant the Petition to determine the standard for affording the non-moving party an opportunity to present evidence which it contends would meet the alleged deficiency in the evidence raised for the first time after the verdict. DAI and FWHI did not object to the jury instruction on abuse of process which is contrary to the legal theory

they asserted for the first time after the verdict was rendered.

DAI and FWHI specifically did not move for a new trial. They did not wish to risk a higher punitive damage award that might result from a new trial. They narrowly tailored their post-judgment request for relief to judgment as a matter of law.

Weible contends that he brought before the court of appeals evidence which, if permitted, would have established the element of the tort of the abuse of process which the court of appeals found to be missing, i.e., some wrongful conduct during the pendency of the wiretap case. Weible submits that a jury could have found that DAI and FWHI regularly communicated with the FBI and the U.S. Attorney's Office, provided them with information obtained through

discovery in the civil case, attempted to convince them to file criminal charges against Weible, and, failing that, convinced the U.S. Attorney's Office to send Weible letters incorrectly advising him that criminal charges would be brought, for the purpose of attempting to coerce a global settlement of the disputes between Weible and DAI and FWHI on grounds favorable to them. a-27-32. The Second Circuit did not mention the letters from the U.S. Attorney's Office advising Weible that criminal charges would be brought, but did conclude that the proposed evidence, which had been stricken from the record before the court of appeals, could not establish wrongful conduct of the kind required for abuse of process under Connecticut law. a-20,21.

Fed. R. Civ. P. 50(a) and (b) require that a court not enter judgment against a party who has not been apprised of the materiality of the dispositive fact and afforded an opportunity to present any available evidence bearing on that fact. Fed. R. Civ. P. 50, Advisory Committee Notes, 1991 Amendment, paragraphs (a)(1).

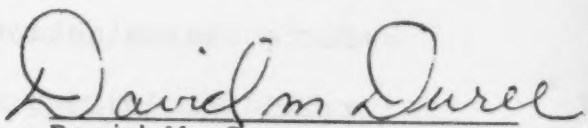
In ruling on motions for judgment as a matter of law under Fed. R. Civ. P. 50(b), appellate courts are not precluded from directing on their own motion that a new trial be had, or from remanding the case to the trial court for a determination as to whether a new trial should be granted. Fed. R. Civ. P. 50(d), Advisory Committee Notes, 1963 Amendment, citing *Weade v. Dichmann Wright & Pugh, Inc.* 337 U.S. 801 (1949).

In the alternative, Weible respectfully submits that the Petition should be granted to establish standards for determining the validity of the proposed evidence which the non-moving party was precluded from presenting because the grounds for the motion for judgment as a matter of law were not presented until after the verdict was rendered.

**CONCLUSION**

For one or more of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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November 12, 1996

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 1279, 1408—August Term 1995

(Argued: April 18, 1996 Decided: August 12, 1996)

Docket Nos. 95-7936, 95-7938

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DOCTOR'S ASSOCIATES, INC.
and FRANCHISE WORLD HEADQUARTERS, INC.,

*Plaintiffs-Appellants,*
*Cross-Appellees,*

—v.—

JOHN M. WEIBLE,

*Defendant-Appellee,*
*Cross-Appellant.*

---

Before:

MINER, MCLAUGHLIN, and LEVAL,
*Circuit Judges.*

---

Plaintiffs appeal from an order of the United States District Court for the District of Connecticut (Goettel,

*J.*), denying their motion for judgment notwithstanding the verdict after a jury found them liable for abuse of process under Connecticut law. Defendant cross-appeals from the district court's order reducing the jury's compensatory damages award to him on his counterclaim.

REVERSED and REMANDED with instructions to enter judgment for Plaintiffs. Cross-appeal DISMISSED as moot.

---

MARK R. KRAVITZ, Wiggin & Dana, New Haven, CT, *for Plaintiffs-Appellants, Cross-Appellees.*

DAVID DUREE, Reinert & Duree, P.C., St. Louis, MO (Nicholas Wocl, Tooher, Puzzuoli & Wocl, Stamford, CT, of counsel), *for Defendant-Appellee, Cross-Appellant.*

---

MCLAUGHLIN, *Circuit Judge*:

Plaintiffs appeal from an order of the United States District Court for the District of Connecticut (Gerard L. Goettel, *Judge*), denying their motion for judgment notwithstanding the verdict after a jury found them liable for abuse of process under Connecticut law. Defendant cross-appeals from the district court's order reducing the jury's compensatory damages award to him on his counterclaim.

## BACKGROUND

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops. It is a Florida corporation with its principal place of business in Florida. The other plaintiff is Franchise World Headquarters, Inc. ("FWHI"), a corporation that provides administrative services to DAI and is located in Connecticut.

In 1988, Defendant John Weible bought a Subway franchise in California. As part of his purchase agreement, Weible entered into a standard franchise contract with DAI; and he also subleased his store premises from Subway Sandwich Shop, Inc. ("SSS"), one of DAI's affiliated leasing companies.

The franchise agreement contained one of DAI's standard arbitration clauses, calling for arbitration of "[a]ny controversy or claim arising out of or relating to this contract." The arbitration would take place "in Bridgeport, Connecticut, or whichever city in which [DAI] is then headquartered." Weible's sublease for the shop contained a "cross-default provision," which allowed the sublessor, SSS, to bring an eviction action against Weible if he breached the franchise agreement with DAI.

A dispute arose between DAI and Weible over his right to buy a second Subway franchise for a reduced franchise fee. Weible stopped paying royalties to DAI, allegedly under a clause in the franchise agreement permitting the franchisee to withhold payment in the event of default by DAI.

SSS, as lessor of the California shop, filed an eviction action against Weible in California state court. Weible appeared *pro se*, but then failed to file an answer; and

a default judgment was entered against him in California.

Weible, still *pro se*, then sued DAI for more than $26 million in California state court, alleging numerous common law violations in connection with his franchise agreement. Pursuant to the arbitration clause in the franchise agreement, the California court stayed the action to allow the parties to arbitrate.

Weible then filed a demand for arbitration with the American Arbitration Association against DAI, seeking $800,000 in compensatory damages and $30 million in punitive damages.

In January 1992, while Weible's California lawsuit and arbitration demand were pending, officials at DAI and FWHI detected that someone had gained unauthorized access to the voice mailboxes of Frederick Deluca, the President of DAI, and Leonard Axelrod, Vice-President and Chief In-House Counsel for DAI and FWHI. Their suspicions had been aroused when they learned that a ribald message, left by a co-worker on Axelrod's voice mailbox, had been transferred to the voice mailbox of another employee, and subsequently "shared" with other co-workers. Shaken by the security breach, the companies conducted an investigation, which led them to point the finger at Weible.

Axelrod allegedly threatened Weible that, unless he abandoned both his arbitration and his California lawsuit against DAI, DAI and FWHI would pursue claims against him for the voice mail "break-in." Weible refused to drop his claims.

DAI sought permission from the arbitrators to add a counterclaim against Weible in the pending arbitration, based on the alleged intrusions into its voice mail sys-

tem. The arbitrators denied DAI's request, finding that the counterclaim was not covered by the arbitration clause in the franchise agreement.

In the meantime, DAI and FWHI filed a damage action against Weible, in the United States District Court for the District of Connecticut, alleging violations of the Oral Communications Act, 18 U.S.C. § 2510 *et seq.*, and the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. § 2701 *et seq.* Weible counterclaimed for common law abuse of process under Connecticut law, claiming that Plaintiffs filed the federal suit solely to strong-arm him into settling or dropping his arbitration demand and his California lawsuit.

DAI and FWHI moved to dismiss the counterclaim for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). They argued that because Weible's counterclaim stated that the abuse of process occurred upon the mere *filing* by Plaintiffs of their complaint, the counterclaim was really a claim for malicious prosecution (or, as it is quaintly called in Connecticut, vexatious litigation) and, as such, that it lacked an essential element of that tort—namely termination of the lawsuit in Weible's favor.

The motion was referred to a magistrate judge (Joan Glazer Margolis, *Magistrate Judge*), who recommended that the motion to dismiss be denied. The district court (T.F. Gilroy Daly, *Judge*) endorsed that recommendation. The case was then transferred to another district judge (Gerard L. Goettel, *Judge*), and proceeded to trial.

In the midst of these federal proceedings, the arbitrators awarded Weible $219,900 on all his arbitration claims. DAI paid the award in full.

*The Trial*

*Plaintiffs' Voice Mail Claims*

DAI and FWHI introduced telephone records demonstrating that, during the seven months between July 1, 1991 and January 31, 1992, about 900 phone calls (aggregating about 124 hours) were made from Weible's home telephone to the toll-free number that, by use of confidential access codes, provides outside access to Plaintiffs' voice mail system. Weible had no business relationship with either DAI or FWHI during that seven-month period.

There was further evidence that, after Plaintiffs learned of the alleged security breach of their voice mail system, they changed the security codes for Axelrod's and DeLuca's voice mailboxes. In the twenty-four hours after the change, 105 calls were made from Weible's home telephone to the toll-free voice mail number. According to computer records, the majority of those calls corresponded to possible unsuccessful attempts to "hack" into the DeLuca and Axelrod mailboxes during the same period.

*Defendant's Abuse of Process Counterclaim*

At trial, Weible presented the following evidence on his counterclaim: (1) Axelrod conceded that DAI and FWHI pursued charges against Weible, but not against another employee who also had gained unauthorized access to the voice mail system, because Weible had filed a suit against DAI and the other employee had not; (2) before Plaintiffs filed this lawsuit, Axelrod allegedly threatened to bring an action against Weible unless he withdrew his claims against DAI; and (3) Plaintiffs sought to recover only a nominal sum from Weible in

this action, but spent a much larger fortune pursuing their claims (suggesting that their motive was pure harassment).

*Pre-Verdict and Post-Verdict Motions*

At the close of all the evidence, Plaintiffs moved for a directed verdict on the counterclaim. *See* Fed. R. Civ. P. 50(a). The district court denied the motion, and submitted all the claims and the counterclaim to the jury.

The jury found for Weible on both Plaintiffs' voice mail claims and on Weible's counterclaim, and on the latter awarded him $95,000 in compensatory damages and $115,000 in punitive damages.

Plaintiffs moved for judgment notwithstanding the verdict on the counterclaim. *See* Fed. R. Civ. P. 50(b). In the alternative, they asked the court to reduce the damages award.

The court denied Plaintiffs' Rule 50(b) motion, but granted their alternative motion by reducing the compensatory damages from $95,000 to $56,556. *Doctor's Assocs. v. Weible*, No 3:92-CV-574 (GLG), slip op. at 2 (D. Conn. Aug. 8, 1995).

DAI and FWHI appeal, arguing that the court erred by failing to grant their motion for judgment *non obstante veredicto* ("judgment n.o.v.") on Weible's counterclaim. (They do not appeal the jury's verdict for Weible on their voice mail claims.) Weible cross-appeals, arguing that the district court should not have reduced the jury's compensatory damages award.

## DISCUSSION

The primary issue in this appeal is whether Weible presented sufficient evidence at trial to permit a rational jury to find in his favor on his abuse of process counterclaim. A careful review of the record compels us to conclude that Weible did not (and, in any event, could not) present evidence sufficient to prevail on this claim under Connecticut law. Thus, we reverse the district court's denial of Plaintiffs' judgment n.o.v. motion, and remand with instructions to enter judgment for Plaintiffs on the counterclaim.

We begin with a procedural nicety. There are no more motions for a directed verdict or judgment n.o.v. Federal Rule of Civil Procedure 50 still "governs the procedure for removing a judgment from the verdict-winner by the use of either a motion for a directed verdict, Rule 50(a)[,] or a motion for judgment notwithstanding the verdict, Rule 50(b)." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 14 (2d Cir. 1993). As of December 1, 1991, however, the hoary terms "judgment notwithstanding the verdict" and "directed verdict" were forsaken. *Id.* Now, both pre-verdict and post-verdict motions under Rule 50 are labelled motions for "judgment as a matter of law." *Id.*

Although the bottles have changed, the wine remains the same: the standard for granting or denying the motion is unaltered. *Id.*; *see* Fed. R. Civ. P. 50 advisory committee's note, 1991 amendment. Alas, still comfortable with the common law language, many courts and litigants—including the district court and the parties in this case—persist in using the terms "directed verdict" and "judgment notwithstanding the verdict" (or "judgment n.o.v."). For clarity, as well as consistency with the

parties' submissions and the proceedings at trial, we will acquiesce in the parties' terminology for purposes of this opinion.

I. *Standard of Review*

We review *de novo* a district court's denial of a judgment notwithstanding the verdict. *See Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1212-13 (2d Cir. 1993); *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

II. *Judgment Notwithstanding the Verdict*

"Judgment n.o.v. is proper 'only if the evidence viewed in the light most favorable to the non-movants, without considering credibility or weight, reasonably permits only a conclusion in the movant's favor.' " *Baskin v. Hawley*, 807 F.2d 1120, 1129 (2d Cir. 1986) (quoting *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 573 (2d Cir.), *cert. denied*, 459 U.S. 838, 908 (1982)); *see also Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 825 & n.16 (2d Cir. 1984); *Schwimmer*, 677 F.2d at 952. In other words, there must be either an utter lack of evidence supporting the verdict, so that the jury's findings could only have resulted from pure guess-work, or the evidence must be "so overwhelming that reasonable and fair-minded persons could only have reached the opposite result." *Baskin*, 807 F.2d at 1129; *see also Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980).

A. *Specificity Requirement*

"[A] motion for j.n.o.v. is technically a renewal of a motion for a directed verdict." *Meriwether v. Coughlin*, 879 F.2d 1037, 1044 (2d Cir. 1989). Thus, Federal Rule

of Civil Procedure 50(b) generally proscribes judgment n.o.v. on any ground not specifically raised in an earlier motion for a directed verdict at the close of all the evidence. *See* Fed. R. Civ. P. 50(b); *Baskin*, 807 F.2d at 1129-30; *see also Samuels*, 992 F.2d at 14; *Meriwether*, 879 F.2d at 1044; *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 367 (2d Cir. 1988). The perfectly defensible rationale for this requirement is to "prevent[ ] a party who loses at trial from using a j.n.o.v. motion as a 'trap' after it is too late for the winner of the verdict to cure any alleged deficiencies of proof." *Meriwether*, 879 F.2d at 1044 (citations omitted); *see also Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993) ("the specificity requirement is obligatory and ensures that the other party is made aware of any deficiencies in proof that may have been overlooked"), *cert. denied*, 114 S. Ct. 1612 (1994); *Smith*, 861 F.2d at 367 ("The purpose of the requirement of specificity is to give the claimant a fair 'opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury.' " (citation omitted)).

(1) *Procedural Challenge*

Weible challenges the procedural sufficiency of Plaintiffs' directed verdict motion, contending that it was not specific enough to preserve their right to move for judgment n.o.v. on the grounds later raised before the district court and again on this appeal.

The relevant portions of Plaintiffs' motion for a directed verdict, made at the close of the evidence, on the abuse of process claim, are as follows:

PLAINTIFFS' COUNSEL: [W]e do intend [to] move for [a] directed verdict on the counterclaim . . . .

* * *

THE COURT: I think [Weible] would argue that even if you [Plaintiffs] prevail on your claim or one of your claims, that the jury could still award him damages on the counterclaim if they believe that although there is a basis for the plaintiff's claim they were probably brought for improper purposes.

* * *

PLAINTIFFS' COUNSEL: I think that turns . . . the law as we now have it, the practice of law on its head because, if, in fact, there's a good faith basis for bringing the claim, then if [Weible's counsel] is right, every time somebody is the defendant to a claim, which [is] an otherwise good faith [ ] cause of action, they are going to say, wait, a second, the real reason you are doing this is because I am your competitor in business and I am your neighbor and don't like you or [your] alleged intrinsic motive.

THE COURT: I don't think they can do that in this instance. The defendant has a claim against the plaintiff which was pending at the time the plaintiff instituted this lawsuit against the defendant.

PLAINTIFFS' COUNSEL: That is true, your Honor, but my other analogy is, and it happens all of the time, as we know, party A files a lawsuit, party B files a counterclaim, it may well be in some of those cases, party B not only has a good faith basis for bringing the cause of action, but . . . also is hoping to get some sort of negotiating leverage or tactical advantage with respect to party A's initial claim by bringing the counterclaim, and there is nothing—law is practiced that way all of the time everywhere in the United States, and I don't think [Weible's counsel] has any indications suggesting that is improper.

* * *

[I]f [Weible's counsel's] theory about this is correct, [and] I am not being facetious when I say this, . . . I think the risk is you would have an infinite series of counterclaims for abus[e of] process. We could bring one against Mr. Weible for abus[e of] process.

THE COURT: That occurred to me you could assert a counterclaim in this case.

PLAINTIFFS' COUNSEL: Another thing is if I could borrow that [the Restatement (Second) of Torts] a minute—one who uses a legal process, whether criminal or civil against another primarily to accomplish a purpose for which it is not designed; goes on to talk

about misuse of process in the comment here. But seeking to vindicate a legitimate legal right as established by federal statute and state statute is not a purpose for bringing the lawsuit; it is not designed—that is why they invented—

THE COURT: That is the issue for the jury, was it brought to recover damages for the defendant or was it brought to make him drop his claims against the plaintiff. That is for the jury. In any event, I deny the motion to dismiss and submit it to the jury.

To meet the specificity requirements of Rule 50(a), a directed verdict motion "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2); *see also Samuels*, 992 F.2d at 15. Scrupulously read, it is difficult to discern an oasis of an idea in this sandstorm of words. What was the precise ground of the motion? We see little other than a jeremiad about the dire consequences of letting the counterclaim stand. Muddying the waters, the district court cut short Plaintiffs' argument, hindering our ability to adequately assess the grounds for the directed verdict motion. *See Wilson Sporting Goods Co. v. David Geoffrey & Assocs.*, 904 F.2d 677, 683 (Fed. Cir.) (holding that "[i]t would be unfair" to deny a party the right to move for j.n.o.v. where "the court cut short counsel's [directed verdict motion], making clear its view that the issue presented a jury question and that it wanted to move on to consider the jury instructions"), *cert. denied*, 498 U.S. 992 (1990); *see also Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979) (holding that oral motion for

"dismissal," made in a colloquy between the court and counsel, was "too confusing to permit confident assessment" that counsel failed to satisfy Rule 50(a)).[1]

B. *Manifest Injustice*

But, even where Plaintiffs' motion is not sufficiently specific to satisfy us, Rule 50 does not necessarily tie our hands. Although the "specificity requirement is obligatory," *Lambert*, 10 F.3d at 54, we will not woodenly apply it merely to attain "an unwarranted triumph of form over substance," *Russo v. New York*, 672 F.2d 1014, 1022 (2d Cir. 1982) (quoting *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (2d Cir. 1970)), *modified on other grounds*, 721 F.2d 410 (2d Cir. 1983). Thus, "relief from this [specificity] requirement is available where necessary to avoid ' "manifest injustice." ' " *Meriwether*, 879 F.2d at 1044 (quoting *Baskin*, 807 F.2d at 1130 (quoting *Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54-55 (2d Cir. 1978))); *see also Samuels*, 992 F.2d at 15.

Under the facts of this case, we find that such injustice would result were we not to reach the question of whether Weible proved his abuse of process claim. Specifically, under Connecticut law *as properly stated*, Weible did not (and could not) present evidence to sustain a verdict that Plaintiffs misused the legal process here.

---

[1] Significantly, the district court denied Plaintiffs' judgment n.o.v. motion, not on the basis that the earlier directed verdict motion lacked specificity, but rather on the ground that "[t]here was evidence in this case from which a reasonable jury could have found for defendant on his abuse of process claim, as charged." *Weible*, No 3:92-CV-574 (GLG), slip op. at 1. The court concluded that "[t]he real purpose of plaintiffs' motion is to *reargue* the issue of whether defendant should have been allowed to assert a counterclaim for abuse of process." *Id.* at 2 (emphasis added)

III. *Abuse of Process*

Under Connecticut law, the elements of a cause of action for abuse of process are as follows:

> An action for abuse of process lies against any person using "a legal process against another in an improper manner or to accomplish a purpose for which it was not designed." Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of "a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed. . . ." (Emphasis added.) Comment b to § 682 explains that the addition of "primarily" is meant to exclude liability "when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant."

*Mozzochi v. Beck*, 529 A.2d 171, 173 (Conn. 1987) (citations omitted).

Thus, under Connecticut law, a party does not abuse the legal process merely by filing suit. This is true regardless of the plaintiff's motive. *See id.* at 173-74; *Varga v. Pareles*, 81 A.2d 112, 115 (Conn. 1951) ("while an ulterior motive often is present, it is not an essential element of the action [for abuse of process]"). Rather, liability for abuse of process lies only when the offending party overtly misuses the process once the proceeding has begun. *See Mozzochi*, 529 A.2d at 174 (abuse of process claimant must "point to specific misconduct intended to cause specific injury outside of the normal

contemplation of private litigation"); *Shaeffer v. O.K. Tool Co.*, 148 A. 330, 332 (Conn. 1930) (abuse of process occurs "not in the issue of process, but in its abuse"); *Lewis Truck & Trailer, Inc. v. Jandreau*, 526 A.2d 532, 534 (Conn. App. Ct. 1987) (" 'the gist of the tort [of abuse of process] is not commencing an action or causing process to issue without justification, but misusing, or misapplying [that] process' " (citation omitted)); *see also Lodges 743 & 1746 v. United Aircraft Corp.*, 534 F.2d 422, 465 (2d Cir. 1975) ("Abuse of process requires more than simply improper motive. There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question . . . ."), *cert. denied*, 429 U.S. 825 (1976); W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 121, at 898 (5th ed. 1984) ("a wilful act in the use of the process not proper in the regular conduct of the proceeding" is one of "[t]he essential elements of abuse of process"). In short, no matter what misconduct by the tortfeasor occurs before the commencement of suit, it is not, in itself, an abuse of process because there is not yet process to abuse.

Examples of such overt misuse during the legal proceedings include: (i) using the pleadings as leverage to coerce the payment of a debt or surrendering of property unrelated to the litigation, *Mozzochi*, 529 A.2d at 172; (ii) using unreasonable force, excessive attachment or extortionate methods to enforce a right of action, *id.* at 172-73; or (iii) using the process to gain a collateral advantage extraneous to the merits, *id.* at 173, *e.g.*, improper use of a subpoena, *Lodges*, 534 F.2d at 465; *see also* Restatement of Torts Second (1977) § 682 cmt. b.

A. *Court's Charge*

The district court gave the following instruction on Connecticut abuse of process law:

> Abuse of process occurs when a person uses a legal process against another in an improper manner or to accomplish a purpose for which it is not designed. If you find that the Plaintiffs *began the lawsuit* against Mr. Weible to coerce him into settling the action against Plaintiffs rather than primarily to bring him into account for what they believe to be his unauthorized use of their voice mail system, then you will find for Mr. Weible [on his counterclaim].

(Emphasis added). Essentially this instruction advised the jury—erroneously—that it should find for Weible if it concluded that Plaintiffs filed the lawsuit with an improper motive. This is not the law of Connecticut.

Judge Goettel himself seemed uncomfortable with the charge he had given, for when it was assailed on the Rule 50 motion for judgment n.o.v., he remarked: "[t]he real purpose of plaintiffs' motion is to reargue the issue of whether defendant should have been allowed to assert a counterclaim for abuse of process. However, this issue was settled [in Judge Daly's ruling on Plaintiffs' 12(b)(6) motion] before this case was transferred to the undersigned." *Doctor's Assocs. v. Weible*, No 3:92-CV-574 (GLG), slip op. at 2 (D. Conn. Aug. 8, 1995). Although the court stated that it had "doubts as to the correctness of the ruling [by Judge Daly]," it nonetheless held that that ruling was "clearly law of the case." *Id.* Thus, the court denied Plaintiffs' motion, finding that "[t]here was evidence in this case from which a reasonable jury could have found for defendant on his abuse of process claim, *as charged*." *Id.* at 1 (emphasis added).

In a similar vein, Weible now contends that this Court is constrained to apply the law of abuse of process *as instructed*, because Plaintiffs' failure to object to the jury instruction means they must now live with the legal theory as articulated by the court.

We disagree. As we stated in *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812 (2d Cir. 1984), a party's failure to object to an erroneous jury instruction:

> does not render the instruction the "law of the case" for purposes of appellate review of the entry of judgment n.o.v. *See* 9 Wright & Miller, [Federal Practice and Procedure: Civil] § 2558, at 670-71 ("Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that.") (footnotes omitted). Rather, we must review the district judge's order [on a judgment n.o.v. motion] *in light of the "applicable law which is controlling, and not what the trial court announces the law to be in [its] instructions."*

*Id.* at 825-26 n.17 (emphasis added) (quoting *Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)).

The Supreme Court, in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), endorsed these precepts:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict *under the properly formulated defense*, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims) respondent failed to

> object to jury instructions that expressed the defense differently, and in a fashion that would support a verdict.

*Id.* at 513-14 (emphasis added) (citing *Ebker*, 739 F.2d at 825-26 n.17).

Thus, even though Plaintiffs failed to object to the court's instruction on abuse of process, we, nonetheless, will apply the law as correctly formulated, not as the district court erroneously framed it.

B. *Application of Law, Correctly Formulated, to Facts*

In his counterclaim, Weible asserted that Plaintiffs were liable for abuse of process because they filed suit against him with a vengeful motive. To quote the counterclaim:

> The Complaint . . . was filed not for the purpose of resolving the [voice mail] claims . . . but instead, was filed for the ulterior purpose of coercing . . . Weible, to settle his complaint pending in California and his arbitration demand, . . . for less than the true and fair value of those claims, and therefore filing the Complaint constitutes an abuse of process . . . .

His counterclaim, however, alleges no particular act of misconduct during the proceedings themselves.

During trial, Weible presented the following proof on his counterclaim: (1) that Plaintiffs had pursued charges against Weible, but not against another employee who had also broken into their voice mail system; (2) that before they actually filed this suit, Plaintiffs allegedly threatened to bring the action unless Weible withdrew

his state and arbitration claims against DAI; and (3) that Plaintiffs knew Weible was not wealthy and would unlikely be able to pay a judgment against him.

At best, this evidence reveals that Plaintiffs manifested a spiteful motive *prior* to the institution of this action. But that is simply not enough. Without evidence demonstrating that Plaintiffs misused the legal process *during* the course of litigation, Weible cannot state a claim for abuse of process. *See Lodges*, 534 F.2d at 465 ("Abuse of process requires more than simply improper motive. There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question . . . ." (footnote omitted)).

The "collateral purpose" Weible cites for this present civil suit—to coerce him into settling his arbitration and state law claims—is tenuous at best. The suggested purpose is not necessarily inappropriate. *See, e.g., Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir.) ("prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced"), *cert. denied*, 116 S. Ct. 305 (1995). Moreover, after Plaintiffs filed suit in December 1992, they did not solicit or engage in any settlement negotiations with Weible. Indeed, Weible prevailed on his arbitration claims in August 1993, and Plaintiffs paid the award in full. Thus, Plaintiffs no longer had the incentive suggested by Weible to pursue the federal action to its conclusion in 1995.

Returning to his Rule 50 specificity argument, Weible contends that, had Plaintiffs "raised their current contentions that the tort of abuse of process required addi-

tional misconduct during the prosecution of the case itself," he would have been able to produce evidence demonstrating such misconduct during these proceedings. Weible claims, for instance, that he would have shown that Plaintiffs provided information, obtained during discovery in their civil case, to the Federal Bureau of Investigation and the United States Attorney's Office in an effort to persuade them to file criminal charges against him.

Weible cites absolutely no authority for the proposition that a civil litigant becomes liable for the tort of abuse of process when it furnishes the government with information uncovered during discovery in a related civil proceeding; and we likewise have found none. While it may be "improper for the Government to institute a civil action to generate discovery for a criminal case," *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986), that rule exists to prevent the government from "avail[ing] itself of [the more liberal] civil discovery devices to obtain evidence for subsequent criminal prosecution." *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965).

There is no allegation that Plaintiffs procured information at the request of the government, or that they gained some collateral advantage merely by giving information to the government. It is within the *prosecutor's* discretion whether or not to institute criminal proceedings. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) (" 'the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion' " (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). In any event, the government never filed criminal charges against Weible in this case. We simply can-

not agree that merely providing information to the government, without more, constitutes abuse of the legal process.

We therefore conclude that, viewing the evidence in the light most favorable to Weible, no jury could reasonably find that he presented sufficient evidence to prevail on his abuse of process claim. Accordingly, we reverse the district court's denial of Plaintiffs' judgment n.o.v. motion, and remand with instructions to enter judgment for Plaintiffs on the counterclaim.

IV. *Cross-appeal*

Weible cross-appeals, arguing that the court incorrectly reduced the amount of the jury's compensatory damages award. Because we reverse the jury award on the counterclaim and order that Plaintiffs' judgment n.o.v. be granted, we dismiss Defendant's cross-appeal as moot.

## CONCLUSION

We have reviewed all other claims advanced on this appeal and find them unavailing. The decision of the district court is REVERSED and REMANDED with instructions to enter judgment for Plaintiffs. Defendant's cross-appeal is DISMISSED as moot.

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**Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**

**(a) Judgment as a Matter of Law.**

**(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

**(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

**(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later

deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

U.S. Department of Justice
*United States Attorney*
*District of Connecticut*
*915 Lafayette Boulevard*
*Bridgeport, Connecticut 06604*

April 14, 1994

David M. Duree, Esq.
Reinert, Duree & Crane, P.C.
812 North Collins
Laclede's Landing
St. Louis, Missouri 63102-2174

Re: John M. Weible

Dear Mr. Duree:

This office has received a report from the Federal Bureau of Investigation indicating that your client, Mr. Weible, violated provisions of the United States Code pertaining to the unauthorized access to an electronic storage system maintained by the Subway company located in Milford, Connecticut. If you would like to discuss the matter before criminal charges are filed, please contact me no later that April 24, 1994.

Very truly yours,

CHRISTOPHER F. DRONEY
UNITED STATES ATTORNEY

**ANDREW P. GAILLARD**
ASSISTANT UNITED STATES ATTORNEY

APG:jlj

U.S. DEPARTMENT OF JUSTICE
*United States Attorney*
*District of Connecticut*
*915 Lafayette Boulevard*
*Bridgeport, Connecticut 06604*

February 14, 1995

**BY FAX**
David M. Duree
Reinert, Duree & Crane, P.C.
812 North Collins
Laclede's Landing
St. Louis, MO 63102-2174

Re: John M. Weible

Dear Mr. Duree:

I have tried to reach you without success to discuss the above matter before criminal charges are filed.

If your client is going to plead not guilty, please advise if he will surrender voluntarily and enter his plea in federal court in the District of Connecticut.

Very truly yours,

CHRISTOPHER F. DRONEY
UNITED STATES ATTORNEY

JOHN W. McREYNOLDS
ASSISTANT UNITED STATES ATTORNEY

**Transcripts from the Billing Records of the Attorneys for DAI and FWHI**

---

C. Spagnola is an FBI agent;
B. Mullen has some unknown connection with the FBI;
L. Axelrod is Vice President and chief in-house counsel for DAI and FWHI;
B. Darrin is an attorney working under Axelrod's direction, in-house;
E. Dunham and I. Chenoweth are attorneys attorneys for DAI and FWHI; and
F. DeLuca is one of the owners of DAI and FWHI;

---

02/02/93 Telephone call to B. Mullen re status of FBI investigation;

02/11/93 Telephone call from C. Spagnola;

02/16/93 Prepare for meeting with C. Spagnola; meeting with him and IEC (Chenoweth);

02/16/93 Meet with FBI agent;

04/19/93 Telephone call to C. Spagnola of FBI; telephone call to L. Axelrod to report on conversation;

05/04/93 Conference call with IEC (Chenoweth), B. Darrin and B. Mullen (potential expert);

05/27/93 Telephone call to B. Mullen;

08/04/93 Telephone call to C. Spagnola regarding status of possible indictment;

08//11/93 Telephone call to L. Axelrod regarding status of Weible indictment; telephone call to B. Mullen regarding approach to FBI regarding same; telephone call to L. Axelrod regarding overall strategy for dealing with current problems;

08/16/93 Conference with C. Spagnola and L. Axelrod regarding status and how to move investigation to indictment;

12/20/93 Telephone call to B. Mullen; telephone call to B. Darrin re report from Mullen on status of FBI investigation;

03/04/94 Telephone call from C. Spagnola at FBI; telephone call to L. Axelrod re status;

03/18/94 Telephone call to Assistant US Attorney and to L. Axelrod re status of criminal investigation;

03/21/94 Gather materials for E. Dunham meeting with U.S. Attorney; draft letter confirming continuance to April 4;

03/21/94 Meeting with C. Spagnola of FBI and US Attorney re status of investigation; telephone call to L. Axelrod re same;

04/04/94 Travel to Waterbury; attend status conference;--telephone call to Assistant U.S. Attorney re possible indictment; telephone call to B. Darrin re same;

09/07/94 Telephone calls re voice mail case, FBI investigation of Weible; collect materials for prosecutor;

09/07/94 Telephone call from C. Spagnola at FBI; telephone call to B. Darrin and L. Axelrod; conference with I. Chenoweth re charges against Weible;

09/08/94 Work on assembly of materials to be sent to C. Spagnola;

09/13/94 Draft letter to C. Spagnola re enclosure of transcripts; assemble same to be delivered; fax requested page of MCI (telephone)record to C. Spagnola;

09/14/94 Telephone conference with L. Rogers re availability of S. Carlson and J. Anderson (all DAI and FWHI employees to meet with prosecutor;

09/16/94 Leave message for C. Spagnola re missing page of MCI printout;

9/21/94 Review message from L. Rogers re meeting with prosecutor;

09/22/94 Spoke to C. Spagnola re charges, prosecutor and setting up meeting with DAI voice mail personnel;

09/27/94 Telephone call to US Attorney re claims, voice mail questions;

10/03/94 Spoke to E. Dunham re conversation with prosecutor;

10/05/94 Draft letter to J. McReynolds, assistant U.S. Attorney, per I. Chenoweth re enclosing requested information; pull and review file re same; prepare package to be mailed out regarding same;

01/03/95 Telephone call from B. Darrin; telephone call to C. Spagnola; conference with I. Chenoweth, all re status of criminal charges;

01/09/95 Call to Assistant U.S. Attorney re status of case against Weible; spoke to J. Dunham re same;

02/16/95 Conference call with B. Darrin and F. DeLuca re status of indictment;

04/27/95 Telephone call to J. McReynolds (Assistant U.S. Attorney);

04/28/95 Message from J. McReynolds re status of criminal proceeding; spoke to J. Dunham and B. Darrin re same.

**The civil wiretap case was tried from June 12 through June 16, 1995.**

Supreme Court, U.S.
FILED
DEC 11 1996
CLERK

No. 96-744

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

JOHN M. WEIBLE,

*Petitioner,*

v.

DOCTOR'S ASSOCIATES, INC. and
FRANCHISE WORLD HEADQUARTERS, INC.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found that on the particular facts of this case there was insufficient evidence to conclude that respondents' timely motions for judgment as a matter of law violated the specificity requirement of Rule 50(a)(2) of the *Federal Rules of Civil Procedure*.

2. Whether the Court of Appeals correctly concluded that, even if respondents' timely motions did not satisfy the specificity requirement of Rule 50(a)(2), the court could nonetheless direct judgment to be entered for respondents to prevent manifest injustice in view of the court's factual finding that petitioner did not, and could not, present evidence to support his abuse of process claim under Connecticut law.

## STATEMENT PURSUANT TO RULE 29.6

Respondents state that they have no parent companies, and that they have no subsidiaries (other than wholly-owned subsidiaries).

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No. 96-744

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

JOHN M. WEIBLE,

*Petitioner,*

v.

DOCTOR'S ASSOCIATES, INC. and
FRANCHISE WORLD HEADQUARTERS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### STATUTORY PROVISION INVOLVED

Rules 50(a) and (b) of the *Federal Rules of Civil Procedure* provide as follows:

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with

respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:
(A) order a new trial, or
(B) direct entry of judgment as a matter of law.

F.R.C.P. 50(a), (b).

## STATEMENT OF THE CASE

Respondent Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and respondent Franchise World Headquarters, Inc. ("FWHI") provides administrative services to DAI. Petitioner John Weible is a former franchisee who owned and operated a Subway restaurant in California. In 1991, petitioner filed a 329-page, 22-count complaint in California state court against DAI and numerous entities and individuals, alleging an array of common law violations arising out of his franchise relationship and seeking damages exceeding $26 million. Petitioner's Appendix ("A") at 4. The California court stayed that action in favor of arbitration pursuant to the standard arbitration clause in Mr. Weible's franchise agreement with DAI. The next year, Mr. Weible filed a demand for arbitration against DAI with the American Arbitration Association, seeking $800,000 in compensatory damages and $30 million in punitive damages. *Id.*

During the course of that arbitration, officials at DAI and FWHI became concerned about the security of the companies' voice mail system. They conducted an investigation, which led them to conclude that since at least July 1991, Mr. Weible had gained unauthorized access to messages left on the voice mailboxes of Frederick DeLuca, the founder, co-owner and president of DAI, and Leonard Axelrod, a vice-president of both DAI and FWHI who supervises the companies' legal affairs. Accordingly, DAI sought permission from the arbitrators to file a counterclaim against petitioner in the pending arbitration based on the apparent intrusions into the voice mail system. *Id.* In October 1992, the arbitrators ruled that these claims were beyond the scope of the arbitration clause and denied DAI permission to add its proposed counterclaim to the pending arbitration. A-5. The arbitration then proceeded in the ordinary course and in August 1993, the arbitrators awarded petitioner $219,900 on all of his claims. Thereafter, DAI paid the arbitrators' award in full, plus interest. *Id.*

Prompted by the arbitrators' refusal to permit DAI to arbitrate the voice mail claims, respondents filed this action in the

United States District Court for the District of Connecticut. The lawsuit sought statutory damages, punitive damages and attorneys' fees under the Oral Communications Act, 18 U.S.C. § 2510 *et seq.* and the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. § 2701 *et seq. Id.* In his answer, petitioner asserted a counterclaim for common law abuse of process in which he charged that this action was filed for the ulterior purpose of coercing him to settle his California lawsuit and his arbitration demand for less than the "true and fair value of those claims." *Id.*

From the beginning, respondents contended that petitioner's abuse of process counterclaim failed to state a claim under Connecticut's common law because it alleged that respondents had committed abuse of process in the mere **filing** of their complaint, rather than in any act or misconduct during the course of the litigation, as required by Connecticut law. A-5. Thus, in a timely motion to dismiss under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, respondents argued that Mr. Weible's counterclaim was in reality a claim for vexatious litigation that lacked the essential element of that tort under Connecticut law, namely the termination of the lawsuit in petitioner's favor. *Id.*

The motion to dismiss was referred to a Magistrate Judge, who issued a Recommended Ruling denying the motion on the ground that Mr. Weible's counterclaim set forth the elements of an abuse of process claim. *Id.* This recommendation was later endorsed by the District Court. Thereafter, this case proceeded in normal fashion, through discovery, pre-trial proceedings and trial. *Id.*

At trial, respondents introduced extensive evidence demonstrating that petitioner had illegally listened to voice mail messages intended for Messrs. DeLuca and Axelrod. A-6. For example, records from the companies' long-distance telephone carrier showed that between July 1, 1991 and January 31, 1992, "about 900 calls . . . were made from [petitioner's] home telephone to the toll-free number that provides outside

access," by use of confidential access codes, "to [DAI's] voice mail system." *Id.* Yet during that period, Mr. Weible had no business relationship with either DAI or FWHI and thus no legitimate reason to be making 900 phone calls to that toll-free number, particularly since the vast majority of these calls were made outside normal business hours, with many coming between midnight and 5:00 a.m., E.S.T. *Id.* Furthermore, in a roughly 26-hour period after the companies had changed the security codes for the voice mailboxes, approximately 105 phone calls were placed from petitioner's home to the companies' toll-free number. As respondents' expert testified at trial, the overwhelming number of these calls corresponded with attempts to break into the voice mailboxes of Messrs. DeLuca and Axelrod. *Id.*

The evidence offered at trial in support of petitioner's abuse of process counterclaim was, like his counterclaim itself, limited solely to respondents' alleged "ulterior motive" in filing this action.[1] However, as to the theory alleged in the counterclaim --namely, that this action was "really" filed to convince him to withdraw or settle his arbitration claim for less than it was worth -- petitioner admitted that nobody acting on behalf of DAI or FWHI had ever initiated settlement discussions with him or anyone acting on his behalf. A-20. In fact, he never produced any evidence that, once this lawsuit was filed, respondents ever used the claims in this proceeding in any manner to get him to withdraw or settle his arbitration claims for any amount, let alone for "less than they were worth." *Id.* The evidence at trial also showed that even after DAI fully paid petitioner's arbitration award (thereby removing the potential use of this lawsuit as a purported "bargaining

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[1] This "proof" consisted entirely of three points: (1) that respondents never sued another employee, who also had gained unauthorized access to the voice mail system; (2) that in February, 1992, nearly a year **before** this lawsuit was filed, Mr. Axelrod allegedly threatened to bring this action unless Mr. Weible withdrew his claims against DAI; and (3) that respondents knew that petitioner was not wealthy and would be unlikely to pay a judgment. A-6 to -7.

chip" to eliminate his arbitration claims), respondents continued to pursue this action against petitioner to judgment. *Id.* In sum, petitioner did not allege or produce any evidence at trial that DAI or FWHI committed any act of misuse, abuse or misconduct of any kind **during** the pendency of this proceeding or trial. A-19.

Accordingly, respondents timely moved for judgment as a matter of law on petitioner's counterclaim at the close of all the evidence, arguing that he had not presented any evidence of abuse of any process during the course of this litigation as Connecticut law required. A-10 to -11. In connection with this oral motion for judgment as a matter of law, respondents' counsel engaged in a brief discussion with the trial judge regarding petitioner's evidence and the necessary elements of his cause of action under Connecticut law. *Id.* However, the District Court cut short counsel's explanation of the facts and law supporting his motion and summarily denied the motion, therefore submitting petitioner's counterclaim to the jury. A-13.

In his closing arguments, petitioner's counsel summed up the evidence on his client's abuse of process counterclaim as follows: "The purpose of this lawsuit against him was to get him to drop [his arbitration]. . . . If that is a purpose and if you believe that is the purpose, that is improper. That is abuse of process." Consistent with this closing argument, the District Court, in charging the jury, also erroneously directed them to find for petitioner on his counterclaim if they concluded that respondents had filed this lawsuit with an improper motive. A-17.

The jury returned a verdict against respondents on their voice mail claims and in favor of petitioner on his abuse of process counterclaim, awarding him a total of $210,000 ($95,000 in compensatory damages and $115,000 in punitive damages). A-7. DAI and FWHI then timely renewed their motion for judgment as a matter of law on petitioner's counterclaim. *Id.* Petitioner opposed this motion and raised, for the first time, his claim that respondents were procedurally barred

from moving for judgment as a matter of law because their motion at the close of the evidence lacked the specificity required by Rule 50(a)(2) of the *Federal Rules of Civil Procedure*. A-14 n.1.

The District Court denied respondents' renewed motion for judgment as a matter of law. Despite petitioner's claim that respondents' oral motion at the close of the evidence lacked the required specificity, the District Court addressed the substance of respondents' motion. *Id.* The court thus did not find, as petitioner argued, that respondents' post-trial motion raised new grounds that had not been raised properly before the case was submitted to the jury. Nor did the trial judge find that the oral motion was vague or otherwise procedurally defective in any manner that would prevent the court from reaching the merits of respondents' post-trial motion.

Instead, the trial court recognized that respondents' post-trial motion for judgment advanced the identical arguments that they had asserted from the beginning of this case. Thus, the District Court observed that in their post-trial motion DAI and FWHI were trying to "reargue" their contention, made as early as their motion to dismiss, that Mr. Weible's allegations of improper motive in the filing of this case did not state a claim for abuse of process under Connecticut law. Respondents' Appendix ("R.A.") at A-2. Because the Magistrate Judge had recommended that DAI's motion to dismiss be denied and the District Court had endorsed that recommendation, the trial judge erroneously concluded that the sufficiency of the evidence submitted at trial on Mr. Weible's abuse of process claim was a "settled issue" that the court was precluded from considering; it was, according to the court, "clearly the law of the case." *Id.*; *see* A-17. Therefore, despite his "doubts as to the correctness" of the Magistrate Judge's ruling, the trial judge incorrectly believed that he could not evaluate the trial evidence on the basis of a correct statement of Connecticut law. R.A.-2.

Respondents timely appealed the District Court's denial of their motion for judgment as a matter of law on petitioner's

counterclaim. A-2. On August 12, 1996, the United States Court of Appeals for the Second Circuit issued its decision on the appeal. The court rejected the procedural challenge that forms the basis of this Petition and after finding that Mr. Weible "did not (and could not)" present evidence to sustain his claim under a correct statement of Connecticut law, the court ordered judgment in respondents' favor on petitioner's counterclaim. A-14, -22.

The Second Circuit's analysis proceeded in several steps. First, the court correctly recognized that Rule 50(a) of the *Federal Rules of Civil Procedure* required respondents' motion for judgment as a matter of law at the close of the evidence to specify the grounds upon which it was based in order to provide Mr. Weible with an opportunity to correct any defects in his proof before the case went to the jury. A-13. The court then reviewed the facts and circumstances surrounding that motion to determine whether it satisfied Rule 50(a)(2)'s specificity requirement. For two reasons, the court found that it could not conclude that respondents had failed to satisfy the Rule: (1) The record of the oral colloquy between respondents' counsel and the court was confusing; and (2) the trial court had "mudd[ied]" the waters by cutting short counsel's argument. *Id.* The Second Circuit found it significant that the District Court, which was most familiar with the arguments counsel had made during trial, did not reject respondents' post-trial motion for failure to comply with the specificity requirement of Rule 50(a)(2). A-14 n.1.

Next, the Second Circuit concluded that, even if respondents' motion had not satisfied the specificity requirement of Rule 50, the court could still consider their sufficiency of the evidence claims in order to prevent manifest injustice under the particular facts of the case. As the court observed, "Although the 'specificity requirement is obligatory,' we will not woodenly apply it merely to allow 'an unwarranted triumph of form over substance.'" A-14. The Second Circuit found that the District Court's instruction to the jury -- that they could find for petitioner if they concluded that respondents had merely filed this lawsuit with an improper motive --

was completely contrary to the law of Connecticut. As the court recognized, Connecticut's common law of abuse of process, like the law of nearly every other jurisdiction, required a showing that respondents misused or abused some legal process **during** the course of this litigation. A-15 to -16. After considering the evidence, the court found that "[u]nder Connecticut law as properly stated, Weible **did not (and could not)** present evidence to sustain a verdict that plaintiffs misused the legal process here." A-14 (emphasis added). The court specifically and carefully considered all of the evidence that petitioner claimed he would have submitted to the jury if respondents' motion for judgment had, as petitioner alleged, been more specific. Nevertheless, the court concluded that none of that "evidence" would have justified a jury in ruling in Mr. Weible's favor on his abuse of process counterclaim under a proper statement of Connecticut law. A-21 to -22.

## REASONS FOR DENYING THE PETITION

The Court should deny the Petition for several reasons. First, the Second Circuit's decision rejecting petitioner's contention that respondents' motion for judgment as a matter of law violated Rule 50(a)(2)'s specificity requirement was based upon well established and correctly stated principles of law and a close examination of the particular facts before the court. There is no reason for this Court to redetermine those facts.

Second, the Second Circuit's additional, independent holding that the court could review the record to prevent manifest injustice, even if respondents' motion failed to meet the specificity requirement of Rule 50(a)(2), is unnecessary to a determination of this case, and is also unremarkable and unquestionably correct. Contrary to petitioner's claim, the Second Circuit's decision is consistent with that of other jurisdictions. No circuit court has ever held that the specificity requirement of Rule 50 prohibits a court from preventing manifest injustice or reversing plain error. Thus, not one of the cases petitioner relies upon supports his assertion of a conflict. Worse yet, he relies upon cases from supposedly

"conflicting" circuits that in fact endorse and apply the manifest injustice standard relied upon by the Second Circuit.

Third, there is absolutely no reason for this Court to issue a nationwide, one-size-fits-all standard for the application of the manifest injustice standard, as petitioner requests. Courts have had no difficulty applying this common appellate standard on a case-by-case basis, upon a close review of the facts of each case and consideration of whether the purposes of Rule 50 have been met. It is, therefore, both unnecessary and unwise for this Court to grant certiorari to articulate uniform national standards under Rule 50(a)(2).

## I. THE SECOND CIRCUIT CORRECTLY APPLIED WELL ESTABLISHED RULES TO THE PARTICULAR FACTS OF THIS CASE

A. The Second Circuit correctly rejected petitioner's procedural challenge to respondents' motion for judgment as a matter of law at the close of the evidence based upon well established principles of law and the particular facts of this case. Accordingly, there is no need for this Court to grant the Petition.

There is no question that the Second Circuit correctly articulated the governing legal rule, namely that Rule 50 generally prohibits judgment as a matter of law unless the movant specifically raised the ground for that motion in an earlier motion at the close of all the evidence. A-10. The court expressly recognized, as petitioner himself argues, that the "specificity requirement is obligatory and ensures that the other party is made aware of any deficiencies in proof that may have been overlooked." *Id.* (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993, *cert. denied*, 114 S.Ct. 1612 (1994)). Thus, petitioner's real complaint is not that the Second Circuit applied an erroneous legal standard, but rather that the court erred in applying this well established rule to the particular facts presented.

Obviously, that contention, even assuming it had merit, does not present an issue that warrants this Court's review. Moreover, as the Second Circuit recognized, the record in this case does not demonstrate that respondents violated Rule 50. There can be no doubt that respondents' counsel timely moved for judgment as a matter of law at the close of the evidence on the ground that petitioner's evidence was insufficient to sustain his claim of abuse of process. A-11 to -13 ("[W]e . . . move for [a] directed verdict on the counterclaim . . ."). While the Second Circuit expressed some difficulty in retrospectively discerning the precise arguments advanced in support of that motion based upon the oral colloquy between counsel and the trial judge, the court recognized that this lack of clarity was in large part due to the fact that the District Court cut short counsel's explanation of the grounds for his motion. A-13. That the trial court stopped counsel in mid-sentence simply underscores the fact that the trial judge understood perfectly well the basis for respondents' motion and did not need to hear additional arguments. After respondents timely renewed their motion following entry of the verdict, the court again denied the motion but not because of any lack of specificity in the earlier oral motion, but rather because the court wrongly believed that it was bound to apply an incorrect statement of Connecticut's common law in determining the sufficiency of petitioner's evidence on his abuse of process counterclaim. Indeed, the court characterized respondents' post-trial motion as simply "reargu[ing]" their earlier motion that petitioner's evidence of improper motive alone was insufficient under Connecticut law to sustain an abuse of process claim. A-17. The trial court was in the best position to know whether counsel had been sufficiently specific in his close-of-the-evidence motion, and that court obviously believed that respondents' motion was plenty specific.

With this clear evidence that the trial court knew precisely the grounds for respondents' motion and the confused record of the oral colloquy that was cut short by the trial judge, the Second Circuit was more than justified in concluding that the factual record of this case did not establish that respondents

had violated Rule 50(a)(2)'s specificity requirement. A-13 to -14.[2] There is no reason for this Court to review that factual determination.

B. The Second Circuit went on to conclude that even if respondents' motion at the close of the evidence did not satisfy Rule 50(a)(2)'s specificity requirement, the court could nonetheless act to prevent manifest injustice "[u]nder the facts of this case." A-14 to -15. This alternative holding by the Second Circuit does not warrant review by this Court. As an initial matter, it is important to note that the facts of this case do not require, let alone present an opportunity for, this Court to reach the Second Circuit's alternative holding because, as discussed above, petitioner failed to demonstrate on this record that respondents violated the specificity requirement of Rule 50(a)(2). More fundamentally, however, this alternative holding is unremarkable and unquestionably correct on the particular facts of this case.

Petitioner does not dispute that the lower court erred in defining the elements of abuse of process under Connecticut law, although he calls this error "somewhat hyper-technical." Petition at 15. Nor does petitioner contest the Second Circuit's finding that the evidence that he presented at trial -- as well as the additional evidence he claimed he could have presented had respondents' motion been more specific -- did not establish abuse of process under a correct statement of Connecticut law. He also does not dispute that respondents made timely motions for judgment on the ground of insufficiency of the evidence at **both** the close of all the evidence and **after** the jury returned its verdict. Petitioner nevertheless contends that despite these circumstances, the Second Circuit was precluded from preventing manifest injustice in this case because the timely motion for judgment at the close of the evidence

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[2] Thus, the Second Circuit specifically relied on *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979) and the following statement of that decision's holding: "colloquy between the Court and counsel was 'too confusing to permit confident assessment' that counsel failed to satisfy Rule 50(a)."

was not, according to petitioner, specific enough to satisfy Rule 50(a)(2).

Petitioner's view of the law is simply wrong. The Second Circuit's alternative holding that it could review the merits of respondents' sufficiency of the evidence claim in order to prevent manifest injustice is entirely consistent with the holdings of numerous other courts that regularly review district court judgments for plain error or to prevent manifest injustice, even in circumstances where (unlike here) **no** motion for judgment was filed at the close of evidence or after the verdict.[3] Thus, a leading commentary observes: "[C]ourts say that on appeal they may consider the insufficiency of the evidence, despite the failure to move for judgment as a matter of law, if it constitutes plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice." 9A Wright & Miller, *Federal Practice and Procedure* § 2536 at 331 (1995 & Supp.); *see, e.g., Polanco v. City of Austin*, 78 F.3d 968, 975 (5th Cir. 1996) (failure to renew motion before the close of all evidence does not preclude appellate court from reviewing sufficiency of the evidence); *McKeel v. City of Pine Bluff*, 73 F.3d 207, 212 (8th Cir. 1996) (appellate court reviews "record to see if the manifest injustice exception to Rule 50(b) applies," even where no motion was made for judgment as a matter of law); *Simon v. Navon*, 71 F.3d at 13 ("a claim for judgment as a matter of law may not be revived on appeal except upon a showing of plain error resulting in a manifest miscarriage of justice");

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[3] When no post-verdict motion for judgment is made at all, some appellate courts have limited the relief they were willing to grant to a new trial only. *See, e.g., Simon v. Navon*, 71 F.3d 9, 13 (1st Cir. 1995); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 854 (Fed. Cir. 1991), *cert. denied*, 504 U.S. 980 (1992). Here, however, it is undisputed that respondents made timely pre- and post-verdict motions for judgment as a matter of law, and therefore, the Second Circuit was fully justified in granting judgment for respondents after considering not only the evidence petitioner adduced at trial, but also the evidence that he claimed he would have presented had respondents' motion been "more specific." A-19 to -20; *see, e.g., Singer v. Dungan*, 45 F.3d 823, 830 (4th Cir. 1995).

*Singer v. Dungan*, 45 F.3d at 827-28 (even though issue not raised in motion for judgment at the close of the case, court reversed judgment where "[p]lain error would result here if the evidence were not reviewed"); *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (appellate courts will review issues not raised in pre-verdict motion for judgment as a matter of law in exceptional circumstances); *First Security Bank v. Taylor*, 964 F.2d 1053, 1057 (10th Cir. 1992) (where grounds not raised in directed verdict motion, court will still review sufficiency of evidence for plain error); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (where no motion made at close of all evidence, appellate review still permitted where "plain error was committed which, if not noticed, would result in a manifest miscarriage of justice"); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d at 854 ("[w]hen no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error").[4]

The Second Circuit's application of this well established standard to the particular facts of this case certainly does not present a question that warrants the grant of certiorari. A-14. Contrary to petitioner's unfounded contentions, the Second Circuit's entry of judgment in favor of respondents on the facts of this case is fully consistent with the policies of Rule 50. As the Advisory Committee Notes to that Rule make clear, Rule 50 is aimed at facilitating "the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. Pro. 50, Advisory Committee Notes, 1991 amendment. In view of the Second Circuit finding that the trial court had erroneously stated the common law of Connecticut and that petitioner "did

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[4] As used in these decisions, the terms "plain error" and "manifest injustice" are simply two alternative ways of describing the same appellate standard of review. *See* Wright & Miller, *supra* § 2536, at 331 (1995 & Supp.).

not (and could not)" sustain his abuse of process claim under a correct statement of Connecticut law, the Second Circuit had an affirmative obligation to correct the error below and order judgment for respondents on petitioner's counterclaim.

## II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS AS TO THE APPLICABLE LEGAL PRINCIPLE

Petitioner erroneously contends that there is a conflict among the circuit courts on whether review for manifest injustice (or plain error) is permissible when a pre-verdict timely motion for judgment as a matter of law fails to satisfy the specificity requirement of Rule 50(a)(2). As discussed above, there is no need for this Court to reach that issue in this case. Moreover, this purported conflict is imaginary only. Petitioner is unable to point to a single decision that prohibits appellate review of a sufficiency of evidence claim under a manifest injustice or plain error standard where a timely motion for judgment as a matter of law was made but did not satisfy the specificity requirement of Rule 50(a)(2).

Petitioner commits several errors in conjuring up this supposed conflict. First, petitioner fails to inform this Court of decisions from supposedly "conflicting" circuits that demonstrate that these circuits do in fact review judgments to prevent manifest injustice or remedy plain error, even where, unlike here, no motion for judgment as a matter of law was filed. For example, while petitioner claims there is a conflict between the Second and Federal Circuits, in *Biodex Corp. v. Loredan Biomedical, Inc.*, *supra*, the Federal Circuit stated, "[W]hen no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error." 946 F.2d at 854 (citations omitted). *See also Acoustical Design, Inc. v. Control Electronics Co.*, 932 F.2d 939 (Fed. Cir.), *cert. denied*, 502 U.S. 863 (1991). Again, completely contrary to petitioner's representations, the Eighth Circuit, in *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995), held unequivocally that it has adopted an exception to

Rule 50 allowing "litigants to present sufficiency of the evidence challenges where not to do so would constitute plain error that would result in a manifest miscarriage of justice." *Id.* (citations omitted). Petitioner similarly misrepresents the positions of the Eleventh and Third Circuits on this issue. *See Narey v. Dean*, 32 F.3d at 1526-27; *Repola v. Morbank Industries, Inc.*, 934 F.2d 483, 489 n.6 (3rd Cir. 1991); *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983).

Indeed, even in decisions cited by petitioner, courts acknowledge or adopt the same standard applied by the Second Circuit, but simply find that on the particular facts presented the appellant failed to demonstrate plain error or manifest injustice. *See, e.g., EEOC v. Wessel*, 55 F.3d 1276, 1286 n.15 (7th Cir. 1995) (court neither accepts nor rejects plain error or manifest injustice exception but notes "if we were to accept it, we would certainly see no plain error or manifest injustice in this case"); *First Security Bank v. Taylor*, 964 F.2d 1053 (10th Cir. 1992) (court affirms trial court's denial of JNOV where no plain error).

The second error that petitioner commits in his effort to create a conflict that does not exist, is that he improperly assumes that if a court does not discuss the manifest injustice/plain error standard, the circuit court has rejected it. Thus, petitioner relies on *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995); *Preferred RX, Inc. v. American Prescription Plan*, 46 F.3d 535 (6th Cir. 1995); and *Murphy v. City of Long Beach*, 914 F.2d 183 (9th Cir. 1990). Yet, in each of these cases, the courts never discussed the manifest injustice standard, and therefore they certainly did not reject it. It is impossible to determine from those decisions whether the appellants in those cases ever even raised the issue, let alone whether the proof, of lack thereof, would have satisfied the standard. Significantly, none of the commentators on the *Federal Rules* note any conflict in the circuit courts on this issue. *See* 5A James W. Moore, et al., *Moore's Federal Practice* 50.12 (2nd ed. 1996); 9A Wright & Miller, *supra*, § 2536 at 331 (1995 & Supp.)

Finally, in his haste to create a conflict, petitioner simply invents an issue that is not presented either by the facts of this case or the holdings below. Thus, petitioner asserts that the issue presented is whether the Second Circuit entered judgment on a "ground not raised in a pre-verdict motion" (Petition at i), thereby implying that respondents presented one ground for their motion for judgment and that the Second Circuit entered judgment for them on an entirely different ground. Petitioner then claims that this imagined holding of the Second Circuit conflicts with decisions of other courts.

But that certainly is not the holding of the Second Circuit or the facts of this case. Petitioner never specifies what "other ground" was raised in respondents' motion for judgment as a matter of law before the District Court. And for good reason. Only one ground--the sufficiency of petitioner's evidence on his counterclaim for abuse of process under a correct statement of Connecticut law--was ever asserted by respondents or discussed by the trial court. A-11 to -14. And, that was the identical ground on which the Second Circuit entered judgment for respondents. A-19 to -22.

Thus, the cases that petitioner cites to create a "conflict" present factual circumstances that are not at all presented by this case and were not addressed by the Second Circuit. *See, e.g., Jones Truck Lines, Inc. v. Full Service Leasing Corp.*, 83 F.3d 253, 258 (8th Cir. 1996) (where motion for judgment only on "ordinary course issue" and motion for new trial on "new value" issue, appellate court will not enter judgment on "new value" issue); *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575 (Fed. Cir. 1996) (where directed verdict motion focused entirely on one issue, JNOV on ground other than one presented in directed verdict motion is not appropriate); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172-74 (3rd Cir. 1993) (appellate court would not consider merits of foreseeability of damages issue not raised in pre-verdict motion).[5]

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[5] Other cases relied upon by petitioner raise the issue whether the trial judge could enter judgment as a matter of law on grounds that the trial

*(Footnote continued)*

In sum, the Second Circuit's alternative decision to review respondents' sufficiency of the evidence claim to prevent manifest injustice is well supported by the facts of this case and decisions of other circuits. Furthermore, there is no conflict of law between the decision of the Second Circuit and the holdings of other circuits that have addressed this issue.

## III. THERE IS NO REASON FOR THIS COURT TO ADOPT UNIFORM RULES FOR THE APPLICATION OF THE MANIFEST INJUSTICE STANDARD

Petitioner's final contention is that this Court should grant his Petition in order to announce national standards for applying the manifest injustice standard. This claim is frivolous. The Second Circuit's decision to enter judgment for respondents was based upon a close reading of the factual record to determine whether the trial court was properly informed of the grounds for their motion, the nature of the error made by the trial court, and whether petitioner could have cured the defects in his case even if respondents' motion had been more specific. Petitioner has given no indication how one-size-fits-all rigid rules could improve what inevitably must be a fact-specific inquiry in each case. Indeed, petitioner has not even suggested what "essential" factors the Second Circuit failed to consider in assessing the totality of the record presented by this case. The appellate courts are best able to review the individual facts and circumstances presented by the trial record in each case, and to correct plain error to prevent manifest injustice, when, as here, that is necessary.

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judge itself raised *sua sponte*, also a circumstance not presented here. *See, e.g., Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3rd Cir. 1989).

Respectfully submitted,

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Date: December 11, 1996

**Attorneys for Respondents Doctor's Associates, Inc. and Franchise World Headquarters, Inc.**

# APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

_____X

DOCTOR'S ASSOCIATES, INC. and FRANCHISE WORLD HEADQUARTERS, INC.,

*Plaintiffs,*

-against-

JOHN MICHAEL WEIBLE,

*Defendant.*

_____X

MEMORANDUM DECISION

3:92-cv-574 (GLG)

Plaintiffs have moved for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b), as to defendant's counterclaim for abuse of process. The surface legal issues raised by this motion are easily dealt with. Plaintiffs' motion fails unless they can show that "there [was] no legally sufficient evidentiary basis for a reasonable jury to find for" defendant as to his counterclaim. Fed.R.Civ.P. 50(a)(1). The charge to the jury on this issue, to which plaintiffs did not take exception, stated:

> Abuse of process occurs when a person uses a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. If you find that plaintiffs began this lawsuit against Mr. Weible to coerce him into settling his action against plaintiffs, rather than primarily to bring him to account for what they believed to be his unauthorized use of their voice mail system, then you will find for Mr. Weible on this counterclaim.

There was evidence in this case from which a reasonable jury could have found for defendant on his abuse of process

claim, as charged. There was evidence of bad blood between defendant and plaintiffs, and there was evidence that an employee of plaintiffs' named Gerald Hadelman who had confessed to breaking into plaintiffs' voicemail system had been treated differently (and arguably more leniently) than was defendant.

The real purpose of plaintiffs' motion is to reargue the issue of whether defendant should have been allowed to assert a counterclaim for abuse of process. However, this issue was settled before this case was transferred to the undersigned. In March 1993, plaintiffs moved to dismiss defendant's counterclaim, arguing that because the claim focussed on the filing of the action, it was essentially a claim for vexatious suit, which cannot be asserted as a counterclaim while plaintiffs' action is still pending. Magistrate Judge Margolis denied plaintiffs' motion in a Recommended Ruling dated June 6, 1993, which was endorsed by Judge Daly on July 12, 1993.

While we have doubts as to the correctness of the ruling, it is clearly the law of the case. Litigants cannot reargue settled issues simply because a case is transferred. Plaintiffs will have to make their arguments before the Court of Appeals.

However, we do agree with plaintiffs that there was no sufficient evidentiary bases for the jury to award defendant $95,000 in compensatory damages, when the only damages defendant presented evidence of at the trial were $56,555.83 in legal expenses in defending against plaintiffs' lawsuit. Defendant argues that since the jury was told that this figure did not include fees for the trial itself, it could have reasonably inferred that defendant had additional expenses in attorneys fees as well as travel and lodging expenses. Plaintiffs respond that if this was indeed how the jury arrived at their figure, then they were engaging in mere guesswork. We agree with plaintiffs, and accordingly we will reduce the jury's award of compensatory damages on defendant's counterclaim to $56,555.83. (Plaintiffs make no argument with respect to the jury's award of punitive damages.)

In conclusion, plaintiffs' motion for Judgment as a Matter of Law [131-1] is granted in part, to the extent of reducing the jury's award of $95,000 in compensatory damages to $56,555.83, and otherwise denied.

**SO ORDERED**

Dated Bridgeport, Connecticut
August 8, 1995.

/s/ Gerard L. Goettel

GERARD L. GOETTEL
U.S.D.J.